



1 "crimes of violence." Hudson appealed his conviction and the Ninth  
2 Circuit affirmed the defendant's conviction and sentence. See  
3 *United States v. Hudson*, 189 F.3d 516 (9th Cir. 1999) (unpublished),  
4 *cert. denied*, 528 U.S. 1098 (2000).

5 On January 8, 2001, Hudson filed a 28 U.S.C. §2255 motion  
6 challenging his conviction. Hudson argued that the district court  
7 did not have jurisdiction over his bank robbery charge, his  
8 attorney was ineffective, and the Government used perjured  
9 testimony at trial. On May 13, 2002, this court denied Hudson's  
10 §2255 motion and Hudson's subsequent request for a certificate of  
11 appealability. The Ninth Circuit also denied this request.

12 On March 8, 2006, Hudson filed the present §2255 motion  
13 challenging his sentence under the Supreme Court's decision in  
14 *Shepard v. United States*, 544 U.S. 13 (2005). Hudson argues that  
15 the holding in *Shepard* creates newly recognized right that is  
16 retroactively applicable to cases on collateral review.

## 17 II.

18 The Antiterrorism and Effective Death Penalty Act of 1996  
19 ("AEDPA") as contained in 28 U.S.C. § 2255, imposes a strict  
20 one-year limitation concerning the time frame within which a  
21 prisoner may bring a motion to vacate, set aside, or correct his  
22 sentence under that section. The one-year period runs from "the  
23 latest" of the events enumerated as follows:

- 24 (1) the date on which the judgment of conviction  
becomes final;
- 25 (2) the date on which the impediment to making a  
26 motion created by governmental action in violation of  
the Constitution or laws of the United States is  
27 removed, if the movant was prevented from making a  
motion by such governmental action;
- 28 (3) the date on which the right asserted was initially  
recognized by the Supreme Court, if that right has

1        been newly recognized by the Supreme Court and made  
2        retroactively applicable to cases on collateral  
3        review; or  
4        (4) the date on which the facts supporting the claim  
5        or claims presented could have been discovered through  
6        the exercise of due diligence.

7        *Id.* Subsections 1, 2, and 4 are inapplicable in the present case.  
8        Hudson's only argument is under subsection 3, that the Supreme  
9        Court's decision in *Shepard* is a newly recognized right and is  
10       retroactively applicable to cases on collateral review.

11       The Supreme Court discussed retroactivity of its decisions in  
12       *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

13       New substantive rules generally apply retroactively.  
14       This includes decisions that narrow the scope of a  
15       criminal statute by interpreting its terms ... as well as  
16       constitutional determinations that place particular  
17       conduct or persons covered by the statute beyond the  
18       State's power to punish ... Such rules apply  
19       retroactively because they necessarily carry a  
20       significant risk that a defendant stands convicted of an  
21       act that the law does not make criminal or faces a  
22       punishment that the law cannot impose upon him.

23       New rules of procedure, on the other hand, generally do  
24       not apply retroactively. They do not produce a class of  
25       persons convicted of conduct the law does not make  
26       criminal, but merely raise the possibility that someone  
27       convicted with use of the invalidated procedure might  
28       have been acquitted otherwise. Because of this more  
speculative connection to innocence, we give retroactive  
effect to only a small set of watershed rules of criminal  
procedure implicating the fundamental fairness and  
accuracy of the criminal proceeding. That a new  
procedural rule is "fundamental" in some abstract sense  
is not enough; the rule must be one without which the  
likelihood of an accurate conviction is seriously  
diminished. This class of rules is extremely narrow, and  
it is unlikely that any [has yet to emerge].

542 U.S. 351-52 (internal quotations and citations omitted).

Contrary to Hudson's arguments, the Supreme Court's decision  
in *Shepard* sets forth a procedural rather than a substantive rule.  
*Shepard* concerned the application of 18 U.S.C. § 924(e), the Armed

1 Career Criminal Act ("ACCA"). 125 S.Ct. at 1257. The ACCA  
2 mandates a fifteen-year minimum term of imprisonment for anyone  
3 possessing a firearm after three prior convictions for serious drug  
4 offenses or violent felonies. *Id.* The issue was whether Shepard's  
5 prior burglary convictions, obtained pursuant to guilty pleas, were  
6 violent felonies. The ACCA defines burglary as a violent felony  
7 only if it was committed in a building, not a vehicle. *Id.* The  
8 Massachusetts statute that Shepard was convicted of violating,  
9 however, criminalized burglary of both buildings and vehicles. *Id.*  
10 The Government argued that the district court should look to police  
11 reports that revealed that Shepard had burglarized buildings and  
12 find accordingly. *Id.* at 1258. The Supreme Court held that the  
13 district court could look only to the indictment and Shepard's  
14 admissions in determining whether the ACCA applied. *Id.* at 1263.  
15 The Court reasoned that permitting the judge to find facts raising  
16 the statutory range of possible sentences would violate Shepard's  
17 Sixth Amendment right to a jury trial. *Id.* at 1262.

18 The *Shepard* holding sets forth the materials a district court  
19 should consider, in certain circumstances, to determine whether a  
20 defendant's prior convictions render him subject to the ACCA's  
21 mandatory minimum sentence. 125 S.Ct. at 1257. This rule is  
22 clearly a procedural rather than a substantive change in the law.

23 A new procedural rule does not apply retroactively unless it  
24 is a "watershed rule" implicating the fundamental fairness and  
25 accuracy of criminal proceedings. *Schriro*, 542 U.S. at 348. The  
26 new rule must be one without which the likelihood of an accurate  
27 conviction is seriously diminished. *Id.* at 352; see *Teague v.*  
28 *Lane*, 489 U.S. 288, 313 (1989). In the present instance, this

1 court finds that the likelihood of accurate convictions is not  
2 seriously diminished without the rule. *Shepard* merely limits the  
3 materials a district court may consider in determining whether  
4 prior convictions subject a defendant to an enhanced sentence.  
5 This decision is consistent with other federal district courts who  
6 have reached this issue. See *Caballero-Banda v. United States*,  
7 2005 WL 2240226 at \*5 (W.D.Tex. 2005) (holding the *Shepard* rule  
8 does not "seriously diminish the likelihood of an accurate  
9 conviction and therefore does not apply retroactively" ); *Langley*  
10 *v. United States*, 2005 WL 1114710 at \*1 (M.D.N.C. 2005) (holding  
11 that *Shepard* is not a watershed change in criminal procedure);  
12 *United States v. Lastrapes*, 2005 WL 3241976 at \*1 (W.D.La. 2005);  
13 *Hirano v. U.S.*, 2006 WL 1343658 at \*6 (D.Hawai'i 2006); *Neff v.*  
14 *Revell*, 2006 WL 1476170 \*3 (S.D.Ill. 2006). Even more  
15 importantly, the Supreme Court has given no indication that *Shepard*  
16 applies retroactively to cases on collateral review.

17 **II.**

18 Accordingly, because the procedural rule set forth in *Shepard*  
19 is not applicable to cases on collateral review, the petitioner  
20 Hudson has provided no basis under which the statute of limitations  
21 on his §2255 motion is tolled and therefore the court finds that  
22 this petition is untimely. **IT IS ORDERED** that Hudson's petition  
23 (#1, 82) be **DENIED**.

24 DATED: This 17th day of July, 2006

25 

26 UNITED STATES DISTRICT JUDGE  
27  
28